IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1033 of 1985

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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STATE OF GUJARAT & 1 - Appellant(s)
Versus
AJANTA CONSTRUCTION CO. - Defendant(s)

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Appearance :
MS ASMITA PATEL, AGP for Appellants
MR KG SUKHWANI for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 19/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. By this appeal, the appellants, State of Gujarat and another seek to challenge the judgement and decree dated 26th December, 1984 passed by the Joint Civil Judge (Senior Division), Amreli in Special Civil Suit No.27 of 1980 whereby their suit against the respondent (original defendant) for recovery of Rs.1209099-30 ps. has been dismissed.

2. The facts of the case are that the Executive Engineer, Bhavnagar Irrigation Division, Bhavnagar, (the appellant No.2 herein) had invited tenders for the work of Earthen Dam of Dhatarwadi Irrigation Scheme. The estimated cost of the work was Rs.13,42,347-00 ps. The respondent, a registered firm carrying on work of contracts submitted it’s tender for Rs.16,17,875-26 ps. The respondent’s tender being the lowest; it was awarded the said work. An agreement (Exh.31) was executed between the parties being CB-2 Agreement No.15 of 1969-70. The tender was accepted on 25.3.1970 and work order was issued on 26.3.1970 and the respondent commenced work on the same day. The stipulated period for completion of contract was 24 months. Accordingly, the work was required to be completed on or before 25th

March, 1972.

3. Thereafter the respondent executed part of the work and in all a total of 10 R.A. Bills amounting to Rs.3,25,983-10 ps. were paid. The 10th R.A. Bill was paid on 30.1.1971. It is the case of the appellants that thereafter, on 7.2.1971, the respondent abandoned the work, hence, vide a communication dated 10.2.1971, the Executive Engineer submitted a proposal to the Superintending Engineer to impose penalty under Clause (2) of the Conditions of Contract.

4. By a notice dated 22nd February, 1971, the respondent was called upon to show cause as to why action may not be taken against it under clause (3) of the Conditions of Contract. In pursuance of the aforesaid proposal dated 10.2.1971, the Superintending Engineer, by a communication dated 2.3.1971 gave his approval for levying compensation at the rate of Rs.9000/- per day with effect from 3.3.1971. As despite the aforesaid show cause notice dated 22.2.1971, the respondent did not resume work, by the aforesaid order dated 2.3.1971 penalty at the rate of Rs.9000/- per day was imposed on the

respondent.

5. Despite action having been taken under clause (2) of the Conditions of Contract, the respondent did not resume work, hence, by an order dated 15.3.1971 (Exh.38) the contract was terminated and the remaining work costing Rs.12,85,300-00 was executed through another agency viz. M/s Patel Brothers at the risk and cost of the respondent as provided under clause (3) of the Conditions of Contract.

6. It is the case of the appellants that on 7.3.1971, a telegram was received from the Advocate of the respondent informing the department that they are terminating their contract on the ground that the department had failed to give designated borrow area for casing materials and design and data are misleading. That the reasons given by the respondent for terminating the contract were not admitted because as per specifications it was shown that there was availability of casing materials. The respondent thereafter instituted a civil suit in the court of the learned Civil Judge (Senior Division), at Amreli, being Special Civil Suit No.51 of 1972. By a judgement and order dated 24th

June, 1976 the said suit was dismissed. Being aggrieved by the aforesaid judgement the respondent preferred an appeal before this Court being First Appeal No.930 of 1976. It may be noticed that, by an order dated 11th July, 1984 passed by this Court, the aforesaid First Appeal was disposed of in the following terms:

> *"Miss Bhavnani for the plaintiff-appellant withdraws the main suit itself which in law is continuing before us in this appeal. The suit stands dismissed as unconditionally withdrawn and so the appeal falls through. The plaintiff-appellant to pay the defendant's costs in both the courts."*

7. It is also the case of the appellants that after terminating the contract the respondent had been informed to remain present on the site at the time of recording final measurement or the work done by the respondent, but no one remained present on behalf of the respondent and ultimately, the Deputy Engineer recorded the measurements on 29.5.1971 and 30.5.1971. That, the remaining work has since then been completed through another agency viz. M/s Patel Brothers, at

the risk and cost of the respondent. It is the case of the appellants that the final bill was received from M/s Patel Brothers, which included the work carried out at the risk and cost of the respondent. That, the same also takes cognizance of the material that was available at the site. As per the say of the appellants, the total amount of work done at the risk and cost of the respondent comes to Rs.1209099-30ps. The break up of the aforesaid sum is enumerated in paragraph 11 of the plaint.

8. It is further the case of the appellants that the Executive Engineer, Bhavnagar had by a communication dated 15.11.71 requested the respondent to remit the amount of Rs.28,314/- to the Government, failing which it would be liable for legal action. However, the respondent had not remitted any amount towards the claim, hence, the appellants had filed the suit to recover the amount of Rs.12,09,099-30 ps.

9. The respondent filed its written statement at Exh.17 and resisted the suit on diverse grounds, interalia contending that the suit does not disclose any cause of action; that the requirement of clause (30) of the

Conditions of contract is not fulfilled as no inquiry as contemplated under the said clause has been carried out, hence, the suit itself is not maintainable; that the suit is not tenable because if at all the appellants had any claim against the respondent, the same ought to have been raised by way of counter claim in the suit filed by the respondent; that the suit is time barred; that the respondent had terminated the contract vide telegram dated 1.3.1971 on account of breaches committed by the appellants, which was legal and valid; that the notice dated 22.2.1971 is illegal and that the same was never served upon the respondent; that as the respondent had never abandoned the work, there was no question of resuming the work; that the imposition of penalty at Rs.9000/- per day is illegal. It was denied that the contract was terminated vide letter dated 15.3.1971, under clause (3) of the conditions of contract. It was alleged that the said letter is got up subsequently and that the respondent had never received the same. It was contended that there was no question of termination of the contract by the appellants as the respondent had terminated the contract prior in point of time. It was submitted that the

telegram dated 1.3.1971 must have been received by the appellants on the same day, hence, the say of the appellants that the same was received on 7.3.1971 is false. It was denied that the remaining work was abandoned by the respondent and that the appellants had got it done through another agency at the risk and cost of the respondent in terms of clause (3) of the printed agreement contract. It was denied that the respondent is liable to pay the sum of Rs.12,09,099-30 ps. as claimed by the appellant. It was submitted that after commencement of work it was found that casing material was not available in the borrow area designated by the appellants. It was also submitted that the design and data were misleading and that the land was not acquired by the Government as a result of which the respondent had to even face prosecution and much humiliation. It was submitted that the respondent has brought the aforesaid facts to the notice of the department, but to no avail; that they had entered into lengthy correspondence with the department and it was only after the respondent was convinced that the appellants had no intention of performing their part of the contract that the respondent terminated

the contract by wire dated 1.2.1971 wherein the grounds for termination had also been stated. It was, therefore, urged that the suit be dismissed with costs.

10. From the pleadings of the parties the trial Court framed the following issues at exhibit-18:

(1) Whether the plaintiff proves that the defendant has not completed contract and committed breach of contract?

(1A) Whether the termination of the contract is legal and valid termination of contract entered into between the parties?

(2) Whether the plaintiff proves that they are entitled to claim suit amount from defendant?

(3) Whether the plaintiff is entitled to claim 12% interest?

(4) Whether the plaintiff is entitled to claim relief as prayed for?

(4A) Whether the defendant proves that

certificate of Sup. Engineer is required under clause (30) of the agreement before filing this suit as contended?

11. The trial court after appreciating the evidence on record and considering the submissions made by the learned Advocates for the respective parties found that in view of clause (2), (3) and (6) of the agreement (Exhibit-31), time was not the essence of contract and held accordingly. The trial court found that the appellants were in the first instance, under a contractual obligation to hand over the borrow area to the respondent to excavate the materials for casing and hearting of the dam and that the appellants had not acquired sufficient land and that sufficient borrow land to meet with the requirement of casing material was not provided to the respondent. The trail court also found that there is no evidence on record to show that the other contractor had done the remaining work by taking casing and hearting material from the same land given to the respondent. From the evidence on record it was found that the respondent had made several complaints to the appellants in respect of insufficiency

of borrow area, however, the appellants did not make available the necessary borrow area. From the borrow area plan Exh.47, and the other material on record, the trial court recorded a specific finding that the land bearing the survey numbers shown therein had not been acquired nor had the possession been taken over by the State Government at the relevant time. The trial Court found that the work commenced on 26.3.1970, whereas the appellants took the possession of the land from its owners in March 1971. Upon perusal of the village records, it was found that the lands situated in the zones of hearting and casing materials was under the personal cultivation of their respective owners and possession was not handed over to the Government. The trial Court therefore, held that the appellants had committed a breach of contract by not acquiring the land and not taking possession thereof before the work order was issued or on or before the contract was entered into. That as the appellants were not in a position to perform their part of the contract, the respondent was no longer obliged to continue the contract and was fully justified in terminating the contract. The trial court

also found that the termination of contract on the part of the appellants is illegal and wrongful and that on the contrary it was the appellants who had caused breach of the contract and not the respondent.

12. As regards the validity of termination of the contract under clause (3) of the agreement, the trial court observed that clause (2) of the agreement was a penalty clause, while clause (3) empowered the appellants to terminate the contract when the contractor i.e. the respondent became liable to pay compensation to the extent of his security deposit. The trial Court found that thus, levy of penalty under clause (2) of the agreement and liability on the part of the contractor to pay penalty to the extent of the security deposit was a condition precedent for terminating the contract under clause (3) of the agreement. The trial court was of the view that before resorting to the provisions of clause (3) of the agreement, there must be a valid levy of penalty under clause (2) of the agreement. The trial court further found that under clause (2) of the agreement an item-wise programme was required to be fixed by the executive engineer, whereas there was no

evidence on record, either oral or documentary, to show that any such programme was ever fixed by the executive engineer at any time. The trial Court, therefore, found that the imposition of penalty under clause (2) of the agreement is illegal and invalid and consequently held that the termination of the contract under clause (3) of the agreement is also illegal. The trial Court also held that since the order of termination had been passed without affording any opportunity of hearing to the respondent contractor, the same was bad on the ground of breach of principles of natural justice. The trial Court also found that there is no allegation of abandonment of the work either in the termination order or in any of the correspondence on record, and therefore the plea of abandonment raised in the plaint is an after thought and as such cannot be accepted. The trial Court accordingly, answered issues No.1 and 1A in the negative, i.e. against the appellants.

13. As regards issue No.4A, the trial Court found that the suit has been instituted without obtaining a certificate from the Superintending Engineer as envisaged under clause (30) of the Agreement. That clause

(30) of the contract is a certificate clause and a condition precedent for filing of the suit and in absence of such certificate the appellants were not competent to file the suit in a court of law. Accordingly, it was held that on this ground the suit was liable to be dismissed. The issue was accordingly, answered in the affirmative, that is against the appellants and in favour of the respondent.

14. Insofar as issues No.2, 3 and 4 are concerned, the trial Court was of the view that in view of the findings on issues No.1, 1A and 4A, the appellants have failed to prove that the respondent had committed breach of the contract and as the appellants had wrongly and illegally terminated the contract and furthermore, since the suit was not maintainable in absence of certificate of the Superintending Engineer, the appellants are not entitled to recover any amount from the respondent. The trial Court was of the view that the burden of proving the claim for damages lies solely on the plaintiffs and that it was for the plaintiffs to prove the same by leading cogent and reliable evidence. After considering the entire evidence on record,

the trial Court found that except for the bare statement of the appellants, there was no evidence on record in support of their claim of Rs.10,28,305-00 by way of extra payment to the agency which had completed the work. It was also found that the appellants had not proved the bills for the remaining work by leading cogent and trustworthy evidence. As regards the claim towards penalty levied under clause (2) of the agreement, the trial court as stated hereinabove had already found the penalty to the illegal; hence, the said claim was found to be bad. As regards the claims at serial No.3 for Rs.31515/-, No.4 for Rs.4927-08 ps., No.7 for Rs.858-08 ps., No.8 for Rs.315-62 ps., No.9 for Rs.1329-83 ps., No.10 for Rs.1129-03 ps., No.11 for Rs.814-61 ps., No.12 for Rs.2614-85 ps., No.13 for Rs.335-93 ps., No.14 for Rs.123.36 ps. and No.15 for Rs.15224-80 ps., the trial Court found that the appellants had not produced any evidence to prove these recoveries, hence, they are not entitled to recover the same. The trial Court accordingly, held that the appellants had failed to prove the suit claim and were therefore, not entitled to claim damages as prayed for. Accordingly, the trial Court further held that as there

is no entitlement towards claim of the principal amount, there cannot be any entitlement towards interest. The trial Court, accordingly, answered issues No.2 and 3 in the negative, that is, against the appellants.

15. In view of the aforesaid findings arrived at by the trial Court, the suit was dismissed with costs, which has given rise to the present appeal.

16. We have heard Ms. Asmita Patel learned Assistant Government Pleader for the appellants and Mr. K.G. Sukhwani learned Advocate for the respondent.

17. The learned Assistant Government Pleader has vehemently assailed the impugned judgement and decree. It was submitted that despite service of notice to the respondent, the respondent had failed to restart the abandoned work, which was sufficient to hold that the respondent firm had committed breach of the contract. It was submitted that accordingly, because of non-restarting of the work by the respondent, the executive engineer had, vide letter dated 15.3.1971, validly terminated the contract under clause

(3) thereof. It was submitted that looking to the terms of the contract and the nature of the work, time was of the essence of the contract, and that the trial court had erred in holding that time was not of the essence of the contract. It was submitted that the trail Court erred on facts in holding that the land in question namely borrow area was not in possession of the Government. It was submitted that the trial court had erred in taking into consideration the documents Exhibit 150 and 151 namely the proceedings before the Mamlatdar, Rajula. That the trial court ought to have appreciated that the said documents were in the course of official proceedings and they do not detract from the fact that unofficially at least the land was in possession of the respondent firm and that it was actually working on it. It was submitted that the trial court had erred in interpreting clause (30) of the agreement and holding that unless a certificate of the Superintending Engineer was obtained the Government could not file a suit. It was submitted that the fact of giving contract to M/s Patel Brothers and the appellant State having spent an amount of Rs.10,28,308/- by way of charges for the remaining work had been sufficiently proved

by the evidence adduced on behalf of the appellant State. It was contended that the other agency who had completed the work abandoned by the respondent had completed the contract by using the same borrow area which was made available to the respondent, hence, the grievance of the respondent that sufficient borrow areas was not made available is falsified. It was accordingly, submitted that the appellants had led cogent and convincing evidence to prove its claim against the respondent and that the trial court had erred in dismissing the suit. It was therefore, urged that the appeal be allowed with cost and the relief claimed for in the suit be granted.

18. Mr. K.G. Sukhwani, learned Advocate for the respondent has supported the impugned judgement and decree. Reiterating the contentions raised before the trial court, it was submitted that the trial court had rightly held that time was not of the essence of the contract. It was further submitted that it was the appellants who had committed breach of the contract, as they were not in a position to perform their part of the contract by providing necessary borrow land as well as proper design and

data. It was submitted that due procedure as contemplated under the provisions of the contract agreement had not been followed prior to termination by the appellants. Moreover, as the respondent had already terminated the contract prior thereto, the termination of the contract by the appellants was itself misconceived, in that a contract, which had already been terminated, could not have been terminated again. In support of the decision of the trial court on the issue regarding non compliance with the provisions of clause (30) of the agreement prior to instituting the suit, it was submitted that clause (30) was in the nature of a certification clause, and certificate of Superintending Engineer admittedly had not been obtained prior to filing the suit. It was also contended that before termination of the contract vide order exhibit 38, it was incumbent upon the appellants to first obtain a decision of the Superintending Engineer, however, no such decision had been given by the Superintending Engineer. It was pointed out that none of the witnesses examined on behalf of the appellants could lead any cogent or convincing evidence, nor could the appellants produce any reliable and

convincing documentary evidence, hence, the trial court had rightly come to the conclusion that the appellants could neither prove the damages sustained by them, nor could they prove that there was any breach on the part of the respondent.

19. The learned Advocate for the respondent raised a further contention that whereas the alleged breach of contract was committed in March, 1971 the suit was filed at a very belated stage in 1980, hence, the suit was barred on the ground of limitation and should have been dismissed on that ground alone. It was pointed out that the said ground had been raised in the written statement, however, it appears that due to oversight no issue has been framed in this regard, accordingly the said issue has not been decided by the trial court. It was submitted that it is settled legal position that the plea of bar of limitation can be raised at any point of time. In support of his contention the learned Advocate placed reliance upon the decision of the Apex Court in the case of ***Food Corporation of India v. M/s Babulal Agrawal*** (AIR 2004 SC 2926). It was urged that the court may also consider the issue regarding bar of limitation and

decide the same. In conclusion, it was submitted that the impugned judgement and decree is just, legal and proper and does not warrant any intervention at the hands of this court. It was, accordingly, prayed that the appeal be dismissed with costs.

20. In rejoinder, the learned Assistant Government Pleader submitted that the plea regarding bar of limitation cannot be permitted to be raised at the appellate stage. It was further submitted that even otherwise the contention regarding the suit having been filed beyond the period of limitation is misconceived, inasmuch the appellant being a State Government is governed by the provisions of Article 112 of the Schedule to the Limitation Act, 1963 wherein the period of limitation for filing a suit by a State Government is thirty years and in the present case the suit has been filed within ten years, which was well within the stipulated period, hence, the issue regarding bar of limitation does not arise at all.

21. Per contra, Mr. Sukhwani learned Advocate for the respondent has submitted that the reliance placed upon Article 112 of the

Schedule to the Limitation Act is misplaced as the present case would fall within the purview of Article 55 of the schedule which specifically provides for the period of limitation for compensation for the breach of any contract. It was submitted that Article 112 is a general provision whereas Article 55 is a specific provision, thus where there is a specific provision, resort cannot be made to the general provision. It was submitted that accordingly, the period of limitation would be three years from the date of the alleged breach as provided under Article 55 and not thirty years as provided under Article 112 of the schedule.

22. Upon considering the rival submissions advanced by the learned Counsel for the parties, as well as examining the record of the case, the issues that arise for determination are: (1) Whether there is any breach on the part of the respondent in performing its part of the contract? (2) Whether time was of the essence of the contract? (3) Whether the contract has been legally and validly rescinded in terms of the contract agreement? (4) Whether the appellants have been able to establish that they have suffered the damages as claimed

for? (5) Whether it is open to the respondent to take the plea regarding bar of limitation at the appellate stage, and if so, whether the suit is barred on the ground of having been filed beyond the period of limitation? (6) Whether it was incumbent upon the appellants to obtain a certificate from the Superintending Engineer under clause (30) of the conditions of contract before filing the suit?

23. As regards the first issue, viz., whether there was any breach of contract on the part of the respondent, the trial court after appreciating and carefully analyzing the evidence on record has recorded a finding of fact that there is no breach of any condition of contract on the part of the respondent contractor and on the contrary it is the appellants who have committed various breaches of contract inasmuch as they have not fulfilled their part of the contract, making it impossible for the contractor to perform his part of the contract. The trial court has found that under the terms of contract the appellants were liable to supply sufficient borrow area as designated in the contract. That the borrow area made available to the contractor was not

sufficient to obtain casing material for execution of the contract. From the evidence led by the witnesses, the trial court has found that the land bearing the survey numbers as shown in the plan exhibit 47, which is the designated borrow area was neither acquired nor was possession of the same taken over through private negotiations before the work was commenced by the respondent. There is a specific finding of fact on the basis of various awards passed by the competent court, in Land Acquisition cases in respect of the lands designated as borrow areas, that the appellants were not in possession of the said lands prior to March 1971, that is, the period of the alleged breach of contract on the part of the respondent-contractor. Upon independently re-examining and re-appreciating the evidence on the record of the case, we find that it was the case of the respondent before the trial court that as the lands required for performance of their part of the contract were not acquired prior to commencement of the work, the Vavera Gram Panchayat had filed a case against the respondent for committing trespass on the land of the panchayat. This position is also admitted by Shri J.B.

Mankad, (who was the executive engineer at the relevant time) who has been examined at Exhibit.95. In his cross-examination this witness has also admitted that the respondent had made written complaint regarding non-providing of borrow land and non-acquisition thereof by the department. The appellants have examined as many as eight witnesses, but have failed to establish that the possession of the lands required for the execution of the contract had been acquired prior to the commencement of the work in question. Moreover, the trial court has also found that the various correspondence on record, which have been proved by the respondent through its witnesses, go to show that the respondent had voiced it grievances several times to the authorities concerned, however, it turned out to be an exercise in futility as the officers of the appellant State did not take any steps to redress the same. The appellants have also failed to establish that the agency which subsequently completed the work had obtained the casing material from the very borrow area that was made available to the respondent. It is in the aforesaid premises that the trial court has come to the conclusion that the breaches, if

any, of the conditions of contract, was on the part of the appellants and not the respondent and that the respondent was justified in terminating the contract on account of the said breaches on the part of the department. We find no reason to take a different view.

24. As regards the contention that time was of the essence of the contract, the said issue is no longer *res integra*. The Apex Court in the case of ***Hind Construction Contractors v. State of Maharashtra***, AIR 1979 SC 720, (which has rightly been relied upon by the trial court) wherein the aforesaid question arose in the context of similarly worded clauses, has held as follows:

> *"In the latest 4th Edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, Para 1179, which runs thus :-*
>
> *"1179. Where time is of the essence of the contract. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is*

power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion. Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed." (Emphasis supplied)

8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

The Court considered several clauses of the

contract in the light of the aforesaid position in law and held thus:

"Two aspects emerge very clearly from the aforesaid two clauses. In the first place under cl. 6 power was conferred upon the Executive Engineer to grant extension of time for completion of the work on reasonable grounds on an application being made by the contractor (appellant-plaintiff) in that behalf; in other words, in certain contingencies parties had contemplated that extension of time would be available to the contractor. Such a provision would clearly be inconsistent with parties intending to treat the stipulated period of 12 months in cl. 2 as fundamental. Similarly, in cl. 2 itself provision was made for levying and recovering penalty/compensation for the appellant-plaintiff at specified rates during the period the work shall remain unfinished after the expiry of the fixed date. Such provision also excludes the inference that time (12 months period) was intended to be of the essence of the contract."

In the instant case, Clause (2) and (6) of the Conditions of Contract are *pari materia* to the clauses considered by the Apex Court in the aforesaid decision. Therefore, in the light of the legal position enunciated by the Apex Court in the aforesaid decision, the contention that time was of the essence of the contract cannot be accepted.

25. We may now examine the issue as to whether

the appellants have legally and validly rescinded the contract in terms of the contract agreement. In this context it would be necessary to advert to the relevant provisions of the contract agreement Exh.31.

26. Clause (2), (3) and (6) of the Conditions of Contract which are relevant for the purpose of deciding the present issue are reproduced hereunder for ready reference:

> **Clause (2)**.-*The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound, in all cases in which the time allowed for any work exceeds one month to complete.*
>
> | | | | |
> |---|---|---|---|
> | *1/4* | *of the work in* | *1/4* | *of the time.* |
> | *1/2* | *do* | *1/2* | *do.* |
> | *3/4* | *do* | *3/4* | *do.* |

Note. The quantity of work to be done within a particular time to be specified above shall be fixed by the Officer competent to accept the contracts after taking into consideration the circumstances of each case and inserted in the blank space kept for the purpose. and abide by the programme of the detailed progress laid down by the Executive Engineer.

The following proportions will usually be found suitable:-

		in	¼	½	¾ *of the time*
Reasonable progress of earth work..	*1/6*	½	¾ *of the total value of the work to be done*		
Reasonable progress of masonry work	1/10	4/10	8/10	do	do

In the event of the contractor failing to comply with these conditions he shall be liable to pay as compensation an amount equal to one percent or such smaller amounts as the Superintending Engineer (whose decision in writing shall be final) may decide of the said estimated cost of the whole work for every day that the quantity of work remains incomplete; Provided always that the total amount of compensation to be paid under the provisions of this clause shall not exceed 10 per cent of the estimated cost of the work shown in the tender.

***Clause (3).**- In any case in which under any clause of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by installments) or in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause, the Executive Engineer, on behalf of the Governor of Gujarat shall have power*

(a) To rescind the contract (of which recession notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence), and in that case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of Government.

(b) XXXXXX

(c) To order that the work of the contractor be measured up and to take such part thereof as shall be unexecuted out of his hands, and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of he sum which would have been paid to the original contractor, if the whole work had been executed by him (as to the amount of which excess expenses the certificate in writing of the Executive Engineer shall be final and conclusive) shall be borne and paid by the original contractor and shall be deducted from any money due to him by Government under the contract or otherwise of from his security deposit or the proceeds of sale thereof, or a sufficient part thereof.

In the event of any of the above courses being adopted by the Executive Engineer the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased, or procured any materials, or entered into any engagements, or made any advances on account of, or with a view to the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provision aforesaid, the contractor shall not be entitled to recover or be paid any

sum for any work therefore actually performed by him under this contract unless and until the Executive Engineer shall have certified in writing the performance of such work and the amount payable to him in respect thereof, and he shall only be entitled to be paid the amount so certified.

***Clause 6.**- If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiration of the period stipulated in the tender or before the expiration of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier, and the Executive Engineer may, if in his opinion, there are reasonable grounds for granting extension, grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final."*

27. On a plain reading of clause (3) of the conditions of contract, it is apparent that the same envisages rescission of the contract in case of two eventualities (1) in case when the contractor has rendered himself liable to pay compensation amounting to the whole of the security deposit under any clause or clauses of the contract or (2) in case the work is abandoned under any of the three contingencies enumerated therein. In the present case it is not clear as to

what is the eventuality under which the appellants have resorted to the provisions of clause (3) of the Conditions of Contract. It would therefore, be necessary to refer in some detail to the evidence on record.

28. Upon carefully examining the documentary evidence and the facts as borne out in the plaint, we find that it is the case of the appellants that after the 10th R.A. bill was paid to the respondent on 30.1.1971, the respondent left the site on 7.2.1971 in pursuance of which, the Executive Engineer submitted a proposal dated 10.2.1971 (Exh.37) to the Superintending Engineer for invoking the provisions of clause (2) of the contract for levy of compensation. Thereafter by a notice dated 22.2.1971, the respondent was called upon to show cause as to why action should not be taken against it under clause (3) of the conditions of contract. That pursuant to the proposal dated 10.2.1971, the Superintending Engineer gave his approval for levying compensation of Rs.9000/- per day by a communication dated 2.3.1971 despite which the respondent did not restart the abandoned work, hence, by an order/letter dated 15.3.1971 the appellants have rescinded the contract. It

is also an admitted position that the respondent had sent a telegram dated 1.3.1971, rescinding the contract on the grounds stated therein, which as per the appellants, was received by them on 7.3.1971. In order to ascertain the exact cause for rescinding the contract on the part of the appellants it would be necessary to closely scrutinize the abovementioned documents as well as the oral evidence led on behalf of the appellants.

29. Shri J.B. Mankad, Executive Engineer, Amreli Irrigation Division, Rajkot has addressed the letter dated 10.2.1971 to the Superintending Engineer, Rajkot Irrigation Project Circle informing him that the respondent has removed machinery etc. from the work site and that nominal labourers are doing the work of cutting trenches, which is also likely to be abandoned at any time. He has therefore, proposed that action be taken under clause (2) of the conditions of contract so that subsequent action under clause (3)(b) and 3(c) can be taken. He has further stated that the contractor’s deposit for the work by January 1971 is Rs.40902/- and has accordingly proposed that penalty be imposed at such rate as to make the

contractor liable to pay compensation amounting to the whole of its security deposit by the date it is deemed fit to consider to take action under clause (3) (b) and 3(c).

Therefore, the action proposed under this proposal clearly is to resort to the provisions of clause (3) of the Conditions of Contract pursuant to taking action under clause (2) thereof.

30. Show cause notice dated 22.2.1971 has been issued by the Executive Engineer, stating that as per the situation prevailing at that time, there were no chances of the respondent firm completing the work within the stipulated time limit and accordingly, calling upon the respondent to show case within 10 days, as to why action under clause No.3 of the conditions of contract should not be taken against it.

This notice neither calls upon the contractor to restart the work nor does it mention that the provisions of clause (3) would be resorted to pursuant to action taken under clause (2). It may be pertinent to note that this letter also does not

allege abandonment on the part of the respondent.

31. It would be pertinent to verbatim, reproduce the contents of the communication dated 2.1.1971, addressed by the Superintending Engineer to the Executive Engineer.

> *"Sub – Dhatarwadi Irr. Scheme – Earthen dam proposal for levy of compens.*
>
> *Ref – 1 Your confl. letter No.AB 1/1 – dt 22-2-71*
> *2 Confn. copy of telegram dt. 1-3-71 from Shri M.K. Parikh – Advocate of M/s Ajanta Const. Co.*
>
> *With reference to your proposal to levy compensation on M/s Ajanta Const. Co. contractors of the above work the same is approved at the rate of Rs.9000/- per day from 3-3-71 till action under clause (3) is taken against them.*
>
> *The rate of compensation is increased than your proposal specially in view of the contr.'s telegram to you referred to at (2) above from where it is clear that they have no intention at all to resume work."*

This letter belies the say of the appellants that the telegram dated 1.3.1971 was received by them on 7.3.1971 as the same finds reference in this letter dated 2.3.1971. Moreover for the purpose of levying compensation at the rate of

Rs.9000/- what has weighed with the Superintending Engineer is not the fact that the respondent has not completed the work within the stipulated period or that they have abandoned the same, but the telegram dated 1.3.1971. Moreover, from the tenor of the said letter it is apparent that it was the intention of the appellants to resort to the provisions of clause (3) when the compensation became equal to the security deposit.

32. The text of the letter dated 15.3.1971, issued by Shri J.B. Mankad, Executive Engineer whereby the contract has allegedly been rescinded, reads as under:

"With reference to this office letter referred to above, you are informed that the portion of the work "Const. of Earthen dam" which has been abandoned by you is ordered to be taken up for execution at your risk and cost under the provision of clause No.3 of the condition of contract for the above work (B-2 Agreement No.15 of 1969-70)

2.1 The final measurements of the work done by you upto date shall be taken on 22-7-71 by the Deputy Engineer, Head Works Sub-Dn. Rajula. You are therefore informed to remain present at the site of work on dt. 22-3-71 when the final measurements will be taken. You should note that if you do not remain present the measurements so

taken & recovered shall be binding upon you."

Upon a perusal of the aforesaid order it is evident that action has been taken under clause (3) of the Conditions of Contract alleging abandonment on the part of the contractor. Moreover, though it is the case of the appellants that the contract has been rescinded under this order, the said order is totally silent as regards rescission of the contract. Presumably, as action has been taken to complete the work at the risk and cost of the contractor under clause (3) of the Conditions of Contract, the same is treated as an order rescinding the contract.

33. A conjoint reading of the aforesaid letters shows that initially action has been proposed to be taken under clause (2) of the Conditions of Contract by levying compensation and upon the compensation so levied being equal to the amount of security deposit, action was proposed to be taken under clause (3) of the said Conditions of Contract as is borne out from the proposal dated 10.2.1971 and approval dated 2.3.1971. However, despite the aforesaid position, the Executive Engineer has in the meantime before receiving approval to his proposal,

proceeded to issue the show-cause notice dated 22.2.1971 calling upon the contractor to show cause as to why action should not be taken under clause (3) as he was of the opinion that there were no chances of the contractor completing the work within the stipulated date. Upon perusal of the record it appears that pursuant to the approval dated 2.3.1971, the Executive Engineer had by a communication dated 3.3.1971 (Exh.107) communicated the same in the following terms: *"The Superintending Engineer, Rajkot Irrigation Circle, Rajkot has ordered to levy compensation of Rs. Nine thousand per day from 3.3.71 onward under clause No.2 of the condition of contract for non-execution of work as provided under the clause."*

Thereafter, vide the order dated 15.3.1971, the contract has been rescinded on the ground that the contractor had abandoned the work.

34. Now in the context of the aforesaid documentary evidence, we may examine the oral evidence led on behalf of the appellants in this regard. The appellants have in all, examined eight witnesses. However, insofar as the rescinding of the

contract is concerned, the testimony of Shri J.B. Mankad who was the Executive Engineer at the relevant time and is also the author of the letter dated 10.2.1971, the show-cause notice dated 22.2.1971 and the order dated 15.3.1971, would be relevant. This witness has been examined at exhibit 95. In his deposition he has stated that he had forwarded the proposal (Exh.37) for levying compensation and forfeiting security deposit of the respondent as per the conditions of the contract. That pursuant to his proposal the Superintending Engineer, Shri V.N. Parikh, had passed an order dated 2.3.1971 (Exh.106) for recovery of compensation at the rate of Rs.9000/- per day. He has further deposed that thereafter notice had been issued to the respondent that they are going to take steps for recovery of compensation under clause (2) of the conditions of contract. He has deposed that the communication dated 15.3.1971 (Exh.38) bears his signature and that by virtue of the said letter, they had also informed the respondent regarding final measurements.

35. Thus, on a conjoint reading of the evidence of this witness as well as the documentary evidence referred to hereinabove, the

intention of the appellants all along was to take action under clause (2) of the contract and thereafter, resort to the provisions of clause (3) to rescind the contract. However, while actually resorting to the provisions of clause (3) of the Conditions of Contract, the same is on the ground of abandonment and not pursuant to the action taken under clause (2) thereof.

36. On a plain reading of clause (2) of the Conditions of Contract, it is apparent that the said provision envisages levy of compensation for every day that the work remains uncommenced or unfinished, after the proper dates. Thus, for the purpose of taking action under this clause, firstly the appellants are required to show that the work had remained uncommenced or unfinished, after the proper dates. The expression “after the proper dates” would pre-suppose that a date wise schedule is fixed by the department. From the evidence on record, there is nothing to show that the department ever prepared any date wise schedule for execution of the work. As stated earlier the stipulated period of contract was 24 months. The alleged order of termination is passed on 15.3.1971 within a period of 12 months of

the commencement of work and much before the stipulated period for completion thereof. In absence of any date wise schedule as envisaged in clause (2) being fixed, there would be no cause for taking action under the said clause as it cannot be said that the work remained uncommenced or unfinished, after the proper dates, more so when the stipulated period for completion of work was still not over. While resorting to clause (2) of the Conditions of Contract, the burden lies on the department to lay a proper foundation regarding the proper dates and the work, which remained uncommenced or unfinished by such date. The department has not been able to discharge this burden. In the circumstances, the appellants have not been able to justify their action of resorting to the provisions of clause (2) of the Conditions of Contract. In the circumstances, the levy of compensation under clause (2) is held to be illegal and invalid. Accordingly, the appellants are not entitled to recover penalty in the sum of Rs.117000/- as claimed for vide claim No.2 in the plaint.

37. From the contents of clause (3) of the Conditions of Contract, it is apparent that

the said clause would become operative only if the respondent contractor renders himself liable to pay compensation (in accordance with clause (2)) or abandons the work either on account of serious illness or death or for any other cause and it is then that the contract would become liable to rescission. Therefore, one of the conditions precedent for taking action under clause (3) of the Conditions of Contract is that the compensation under clause (2) thereof should be equal to the security deposit. Therefore, in view of the fact that the levy of compensation under clause (2) is held to be invalid, as a necessary corollary, the resort to clause (3) on this count would also be invalid. Insofar as rescission of the contract on the ground of abandonment is concerned, there is no evidence worth the name led by the appellants to show that the respondent had abandoned the work, so as to justify rescission of the contract on that ground. In the aforesaid view of the matter the so-called rescission of the contract by letter dated 15.3 1971 is not in consonance with the Conditions of Contract and the same is accordingly, held to be illegal and invalid.

38. The next issue is as to whether the appellants have been able to prove the damages as a result of the alleged breach of contract. These damages consist of the extra amount that the Government had to spend for getting the work executed by the other agency, namely M/s Patel Brothers. Therefore, there is no dispute that the damages were capable of being ascertained. The appellants have raised their claim under as many as 15 heads. The respondents have disputed the amount of loss as stated by the appellants. It was the duty of the appellants, in these circumstances, to lead evidence as to the proof of the loss sustained by the Government. The appellants could not have merely relied upon the Final Bill received from M/s Patel Brothers. Though as many as eight witnesses have been examined on behalf of the appellants, nobody has led any evidence to prove the loss caused to the Government. Besides, there is no evidence to show that the actual expenses incurred in executing the remaining work at the risk and cost of the contractor was as stated in the statement of claims. The agency concerned with the carrying out the remaining part of the work was the competent witness to prove the same, but no

representative of the said agency has been examined as a witness. The result therefore, is that the department has utterly failed to prove the loss alleged by it. It was up to the appellants to prove their claims against the respondent however; the appellants have failed to prove the damages sustained by the Government if any, in getting the work executed by another agency.

39. Insofar as the contention regarding the suit being barred by limitation is concerned, we hold that the contention raised on behalf of the Government that the same cannot be raised at the appellate stage does not merit acceptance. The Apex Court in the case ***of Food Corporation of India v. M/s Babulal Agrawal*** (supra) has held thus:

"In connection with this objection regarding limitation, learned counsel for the plaintiff has submitted that no such plea was ever raised by the defendant nor any facts or reasons were indicated as to in what manner the suit was barred by limitation. No issue was framed on the question of limitation. That point was not raised even in the High Court nor in this Court too. It is only in the list of dates/synopsis it is vaguely stated that the suit was time-barred. Learned counsel for the defendant-appellant, however, relying upon Section 3 of the Limitation Act submits that it was the duty of the

Court to see as to whether the suit was within limitation or not. A suit filed beyond limitation is liable to be dismissed even though limitation may not be set up as a defence. The above position as provided under the law cannot be disputed nor it has been disputed before us. But in all fairness it is always desirable that if the defendant would like to raise such an issue, he would better raise it in the pleadings so that the other party may also note the basis and the facts by reason of which suit is sought to be dismissed as barred by time. It is true that the Court may have to check at the threshold as to whether the suit is within limitation or not. There is always an office report on the limitation at the time of filing of the suit. But in case the Court does not prima facie find it to be beyond time at that stage, it would not be necessary to record any such finding on the point much less a detailed one. In such a situation at least at the appellate stage, if not earlier, it would be desired of the defendant to raise such a plea regarding limitation."

In the light of the aforesaid decision of the Apex Court, it would be permissible for the appellant to raise the plea of limitation at the stage of appeal. Moreover, it may be noted that the plea of limitation has in fact been raised in the written statement, however, no issue had been framed in that regard. However, considering the fact that we are inclined to confirm the impugned judgement and decree we do not find it necessary to enter into and decide the

larger issue as to whether the suit filed by the Government would be governed by the provisions of Article 112 of the Schedule to the Limitation Act as contended by the learned Assistant Government Pleader or by the provisions of Article 55 as contended by the learned counsel for the respondent. We, accordingly, leave the issue open to be decided in an appropriate case.

40. Regarding the issue as to whether Clause (30) of the Conditions of Contract is a certification clause whereby it is incumbent upon the department to first obtain a certificate from the Superintending Engineer under the said clause before filing a suit, it may be necessary to refer to the provisions of the said clause which reads as under:

> *Clause 30.- Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the Code rules then in force, the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all the parties to the contract upon all questions relating to the meaning of the specifications, designs, drawing and instructions hereinbefore mentioned as to the quality of workmanship or material used on the work or as to any*

other question claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the completion or abandonment thereof."

From the language employed in the aforesaid clause it is clear that in relation to all questions enumerated therein, the decision of the Superintending Engineer shall be conclusive and binding on the parties. The same nowhere lays down that in relation to any claim arising out of the contract no suit can be filed by the Government without certification from the Superintending Engineer. If the proposition canvassed on behalf of the respondent were to be accepted, the same would also be applicable in a converse case wherein a suit is filed by the contractor, who would then be required to obtain such certificate before filing a suit, because the language employed in the clause is that the decision of the Superintending Engineer in the eventualities enumerated therein shall be final, binding and conclusive on all the parties to the contract, and not the department alone. We

have perused the decisions relied upon by the trial Court and find that none of the said decisions are relevant to the issue in question. The decision of this Court in the case of ***District Panchayat, Bhavnagar v. M/s Mahmad Haji Gafur & Co***. (AIR 1984 Gujarat 98) is a decision on the question as to whether Clause (30) of B-2 Form amounts to an arbitration clause. Following the ratio laid down by the Apex Court in the case of ***State of U.P. v. Tipper Chand***, AIR 1980 1522, this Court held that the said clause does not contain any express arbitration agreement. In the circumstances, it appears that the trial Court has misdirected itself while deciding this issue. It is therefore, not possible to agree with the trial Court insofar as the interpretation of clause (30) is concerned.

41. For the foregoing reasons, except for the fact that we do not agree with the trial Court’s interpretation of Clause (30) of the Conditions of Contract, we are in agreement with the findings arrived at and the ultimate conclusions and resultant order made by the trial Court. In the result, the appeal fails and is accordingly, dismissed. However, in the circumstances, as we have

not agreed with the trial Court on all the issues, the parties shall bear their own costs.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

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